



**DEPARTMENT OF FAIR EMPLOYMENT
AND HOUSING
ENFORCEMENT DIVISION
DIRECTIVE**

**DIRECTIVE NUMBER
207**

**DISTRIBUTION DATE
February 7, 2005**

1. **SUBJECT: ACCEPTANCE OF COMPLAINTS INVOLVING CO-RESPONDENTS OR PARTIES OTHER THAN THE PRIMARY RESPONDENT**
2. **PURPOSE:** To set forth the procedures for naming individual co-respondents and entities other than the primary respondent in employment cases.
3. **BACKGROUND:** Under the Fair Employment and Housing Act (FEHA) and in decisions of the Fair Employment and Housing Commission (FEHC), individuals can be held personally liable for damages arising from certain acts of illegal discrimination. There are also occasions when entities other than the primary respondent may have liability. Further, it is sometimes necessary to name persons in the FEHA complaint so that the complainant can pursue a lawsuit against those persons. These "co-respondent" complaints can be taken in Employment, Unruh Civil Rights Act, Ralph Civil Rights Act, and Civil Code section 54 cases.
4. **PROCEDURES:**
 - A. **Identifying Co-Respondents:**

In most instances, complaints are taken against a "primary respondent" (e.g., the entity directly involved in the employer-employee relationship; the establishment in which complainant was refused service, etc.). However, individuals or entities other than the primary respondent may be involved in alleged acts of discrimination. It is important, therefore, to identify those entities or persons against whom complaints of discrimination may be filed. These individuals or entities can be:

 - 1) Persons or entities with which there is a direct employer-employee relationship, such as those when:
 - a) The individual is an alleged harasser or a direct party to other types of discrimination. This includes co-workers, unless the complainant objects to naming these persons as individual co-respondents.

- b) The complainant or his/her attorney or representative specifies an individual or entity. While DFEH will not refuse to name an actual individual, it will not name a non-specific individual such as "John Doe."
 - c) The respondent is a subsidiary of a parent company. In this instance, both companies can be named.
 - d) There are multiple owners (partners, shareholders). Individual complaints should be taken against the individual owner(s) or partner(s) actually charged in the complaint.
 - e) The alleged unlawful act is connected to provisions in a collective bargaining agreement between an employer and a union representing the employees. In these cases, the union can be named as a co-respondent. (Refer to Directive 220, "Complaints Against Labor Unions.")
- 2) Persons or entities outside the direct employer-employee relationship may also be held liable for sexual harassment under the FEHA. An example of such a person would be a salesperson that harasses the victim while selling a product to the victim's employer.

The employer is liable if he/she had actual or constructive knowledge of the outsider harassment and failed to take immediate and appropriate corrective action. In reviewing cases involving the acts of non-employees, the extent of the employer's control and any other legal responsibility which the employer may have with respect to the conduct of those non-employees shall be considered. The employer of the outside harasser may also be liable.

Ensure that such persons or entities are named in the body of the complaint. However, separate complaints will be taken against these "outsider" entities. (Refer to Attachment 1 - "Sample Complaint for Respondents and Co-Respondents Outside the Direct Employer-Employee Relationship.")

- 3) In addition to business establishments, individuals may also be personally liable for Unruh Civil Rights Act violations. An example of such a scenario is demonstrated by the following hypothetical:

A student alleges that he or she is subjected to unwelcome harassment by fellow students. The aggrieved person attempts to obtain assistance from school officials to stop the harassment. The school officials do not take any action. (Davison ex rel. Sims v. Santa Barbara High School Dist.)

(C.D.Cal. 1998) 48 F.Supp.2d 1225; Nicole M. By and Through Jacqueline M. v. Martinez Unified School Dist. (N.D.Cal. 1997) 964 F.Supp. 1369.)

Both the school or school district and the individual school officials may be liable for a violation of the Unruh Civil Rights Act. Accordingly, a co-respondent complaint should be filed against the school official. This analysis would apply equally to private businesses.

B. Drafting A Complaint:

- 1) Identify individuals (if known) responsible for the alleged discrimination in the body of the complaint, regardless of whether the complainant wishes them named as co-respondents. This usually includes:
 - a) The individual making the decision complained of;
 - b) Any individual accused of committing or participating in the harassment, offensive behavior or discrimination; or
 - c) Anyone in a management or supervisory position who is believed to have failed to take action to prevent or eliminate harassment or discrimination.
- 2) When an individual is named as a co-respondent, the body of the complaint will contain specific language clarifying why that person is so named. For example:
 - a) "On January 2, 2004, I told John Jones, Vice President, about the harassment and he told me I had to put up with it;"
or
 - b) "On April 1, 2004, Joe Smith, Plant Manager, threatened to fire me if I would not go to a motel with him."
- 3) Entries naming individuals in the body of the complaint should include a description of the nature of their involvement as well as the relevant dates or approximate dates.
- 4) The assigned consultant will be responsible for identifying and naming all harassers, even if they are not initially named by the complainant in the Pre-Complaint Questionnaire.
- 5) In most instances, co-respondent complaint allegations should be the same as the primary complaint. However, if co-respondent

complaint allegations are different, a separate primary complaint should be taken.

- 6) In those instances when there are respondents who exist outside of the direct employer-employee relationship, a separate primary complaint will be taken.
- 7) The attached sample complaint demonstrates how to name respondents and co-respondents in an instance when a female employee of a store was harassed by an outside vendor and reported the incident to her manager who failed to take corrective action. A primary complaint should be taken against complainant's employer with a co-respondent complaint being taken against her manager as an individual. A separate primary complaint would be taken against the employer of the harasser who was outside of the direct employer-employee relationship and a co-respondent complaint taken against the alleged harasser as an individual. (Refer to Attachment 1 - "Sample Complaint for Respondents and Co-Respondents Outside the Direct Employer-Employee Relationship.")

C. Mohasco Complaints:

All primary and co-respondent complaints that fall within the Mohasco time frames will be closed with Closing Category 11, "Processing Waived to Another Agency." A copy of the co-respondent complaint(s) will be stapled behind the primary complaint and then transmitted to EEOC.

EEOC will decide whether it will proceed against the co-respondent(s). Such should be conveyed to complainant during intake.

D. Preparing Complaint for Processing and Computer Entry:

- 1) Co-respondent complaints will contain the text of the primary complaint and be numbered sequentially as an addendum to the primary complaint.

Example: The primary complaint number will always have "00" between the case number and the suffixes (e.g., E-200304-R-1111-00-se), regardless of whether there is a co-respondent. The first co-respondent complaint number would be "01" (e.g., E-200304-R-1111-01-s), the second would be "02" (e.g., E-200304-R-1111-02-s), etc.

- 2) An EEOC dual-filed suffix indicator "e" will not be included on co-respondent complaints. All other suffix codes will apply.

- 3) For all complaints that have co-respondents, a completed Co-Respondent EDP Open Report (DFEH-800-03) will accompany the draft complaint and the service instruction package to the clerical staff. List all co-respondents on the DFEH-800-03. Separate service letters and supplemental service documents are to be requested using the appropriate coding for each co-respondent.
- 4) Primary respondent complaints will be dual-filed with EEOC when appropriate. Co-respondent complaints will not be dual filed.

E. Service of Complaints Against Co-Respondents:

- 1) The assigned consultant will ensure that co-respondent complaints are properly served.
- 2) Individual co-respondent complaints will be served on the named individual, not the agent or representative of the respondent, unless that person is also a co-respondent.
- 3) When the complainant has no address for a co-respondent, the co-respondent complaint will be served by certified mail on the respondent's address.
- 4) Complaints against co-respondents can also be served in person. (Refer to Directive 233, "Service of Complaints.")
- 5) If service is not effectuated at respondent's facility (not accepted or co-respondent is no longer with respondent), an attempt to serve the complaint at the co-respondent's last known address, according to the respondent's records, will be made. Addresses for co-respondents may be subpoenaed from the primary respondent, if necessary.

F. Adding Co-Respondents After a Complaint Has Been Filed:

- 1) In those instances when a co-respondent is added to a complaint after the initial intake, it should be done within one (1) year of the alleged illegal act. It is the responsibility of the assigned consultant to ensure that any additions are effectuated in a timely manner.
- 2) In those instances when there is a need to add co-respondents to a case and when the body of the complaint has not changed, the complaint will be drafted using the same basis(es), alleged act(s) of harm, complaint text and date(s) as on the original complaint and be handled as a new complaint. They will be given the same case number as the primary complaint with the addition of the appropriate co-respondent suffix (e.g., 01, 02, etc.) because they

are actually co-respondent complaints even though they are being treated as new complaints.

- 3) Co-respondents can be added to cases that have been closed by DFEH as long as it is done within one (1) year of the alleged illegal act.
 - a) When adding co-respondents to a closed investigated case, complaint taken for filing purposes only ("b" complaint), or where complainant requests an immediate right-to-sue ("c" complaint) when the complainant is **not** represented by counsel, a Notice of Filing of an Additional Complaint to a Closed Discrimination Complaint (DFEH-200-51) will be used for service.
 - b) When adding co-respondents to a closed "c" case where the complainant **is** represented by counsel, a "Notice of Filing a New Co-Respondent to a Closed Discrimination Complaint" (DFEH-200-51a) will be used for service.
- 4) When there are any changes to the body of the complaint which are necessitated by the addition of co-respondents, refer to the instructions in Directive 208, "Amending Complaints."

G. Withdrawal of Complaints With Co-Respondents:

- 1) When a complainant requests to withdraw all his/her complaints at the same time, only one "Request to Discontinue Investigation of Complaint" (DFEH-600-06A or B) or "Request for Authorization to File a Lawsuit" (DFEH-600-09A or B) will be completed. All complaint numbers are to be reflected on that form (e.g., E-200304-E-0999-00, 01, 02, 03, etc.).
- 2) When a complainant requests to withdraw one (or more) of the complaints but leave others open, a DFEH-600-06A/B or DFEH-600-09A/B will be completed for each complaint selected.

H. Settlement Agreements in Cases With Co-Respondents:

- 1) In preparing settlement agreements in cases in which there are co-respondents, all complaint numbers are to be reflected on the settlement agreement.
- 2) In cases in which a co-respondent is not a party to the settlement agreement, the co-respondent case may be closed along with the primary case if the complainant agrees that all the issues with the co-respondent have been addressed by the settlement agreement.

I. Closing Cases With Co-Respondents:

- 1) Cases with co-respondents will normally be closed with the same closing report using the same closing category and computer form as the primary case. Unless otherwise instructed, data entry clerks will close all co-respondent cases at the same time as the primary case is closed.
- 2) In those instances when a case with a co-respondent is closed separately from the primary case, a separate closing report (DFEH-400-20 or DFEH-600-20) and EDP Update/Closure Report (DFEH-800-02) must be completed for the co-respondent. In addition, in instances when primary and co-respondent cases are closed with different closing categories or are closed at different times, a separate EDP Update/Closure Report must be completed for each case.

5. APPROVAL:

Suzanne M. Ambrose, Director

Date

SAMPLE COMPLAINT FOR RESPONDENTS AND CO-RESPONDENTS OUTSIDE THE DIRECT EMPLOYER-EMPLOYEE RELATIONSHIP

- **Complaint Against Complainant's Employer**

Name as Respondent: Short's Drug Stores E-200304-R-1111-00-se

- **Complaint Against Manager Who Knew of Acts of Discrimination and Failed to Act Appropriately**

Name as Respondent: Draig, James, As an Individual E-200304-R-1111-01-s

- **Complaint Against Employer of Harasser Outside Direct Employer-Employee Relationship**

Name as Respondent: Sunrise Cola Company E-200304-R-1112-00-se

- **Complaint Against Harasser Outside Direct Employer-Employee Relationship**

Name as Respondent: Smith, Joe, As an Individual E-200304-R-1112-01-s

During my employment as a clerk for Short's Drug Stores, I was sexually harassed by Joe Smith, a vendor for Short's Drug Stores. The last incident occurred on July 8, 2003.

I believe I was sexually harassed which is discrimination based on my sex, female. My beliefs are based on the following:

- A. From approximately May 1, 2003 to July 8, 2003, I was sexually harassed and denied the right to work in a harassment-free environment by Joe Smith, a vendor of Short's. Mr. Smith is a sales representative, employed by the Sunrise Cola Company. The harassment was of a verbal and physical nature, and occurred at least twice a week. The harassment created a hostile work environment.
- B. The unwanted sexual advances were witnessed by several co-workers (names on file with DFEH).
- C. I reported the harassment to Short's Store Manager, James Draig, on May 12, 2003 and on June 15, 2003. Mr. Draig failed to take corrective action.
- D. To the best of my knowledge, the Respondent failed to take the reasonable steps to prevent harassment from occurring. The Respondent does not have a sexual harassment policy nor has the Respondent engaged in preventative steps to discourage harassment.